

# CANADIAN PRACTITIONERS' PERSPECTIVE ON SANCTIONS AND TRADE CONTROLS

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## INTRODUCTION

Notwithstanding the high degree of interdependence and market integration between Canada and the United States, one of the most significant issues over which these two governments agree to disagree is policy and legislation with respect to Cuba. Over the past several years, Canada has become one of Cuba's largest sources of investment, vying for the top spot with countries such as Spain and Mexico.<sup>1</sup> Consequently, United States government actions relative to Cuba directly impact the relationships between the Canadian and Cuban governments, the Canadian and the United States governments, as well as the private sector of each country.

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1. See *Foreign Investment and Cuba* (visited Jan. 9, 1998) <<http://www.cubatrade.org/foreign.html>> [hereinafter *Foreign Investment and Cuba*]; *Foreign Investment Update* (visited Jan. 9, 1998) <<http://www.cubatrade.org/eyeong.html#806>>.

## I. UNITED STATES LEGISLATION

### A. United States Anti-Cuba Legislation (1960–1992)

In 1960, as a result of Cuban nationalization in the late 1950s and the formation of a relationship between Cuba and the former Soviet Union, the United States imposed a limited ban on exports to Cuba.<sup>2</sup> Shortly afterwards, the United States broke off all diplomatic relations with the Cuban government and enacted the Cuban Assets Control Regulations (CACR).<sup>3</sup> The CACR effectively created a full trade embargo on exports to Cuba.

Canadian companies continued to develop interests in Cuba following the enactment of the CACR because the United States did not attempt to apply the CACR extraterritorially. The CACR created a mechanism whereby foreign subsidiaries of U.S. companies could apply for licenses to export goods to Cuba. The licenses were generally granted by U.S. authorities on the condition that components originating in the United States were strictly limited. Additionally, United States technical information was not permitted to pass to Cuba.<sup>4</sup> Furthermore, strategic exports were prohibited and the foreign subsidiary was required to be independent in its dealings with Cuba.<sup>5</sup> Since these terms affected only companies over which the United States could exercise jurisdiction through control of the parent company, foreign countries did not suffer significant economic consequences because the subsidiaries were generally permitted to continue operations under the licensing scheme. Consequently, the CACR did not have an extraterritorial effect and, thus, did not attract a significant degree of attention.

The tenor of U.S. policies against Cuba was altered by the enactment of the Cuban Democracy Act of 1992 (CDA).<sup>6</sup> The CDA re-

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2. See *Chronology of the U.S. Embargo* (visited Jan. 9, 1998) <<http://www.brudershof.org/whatsnew/events/cuba/chronolgy.htm>>; *Cuba: A Guide for Canadian Business* (visited Jan. 9, 1997) <<http://www.dfait-maeci.gc.ca/geo/latin/cuba/cuba-e.htm>> [hereinafter *Cuba: A Guide for Canadian Business*].

3. 31 C.F.R. pt. 515 (1997).

4. See 31 C.F.R. § 515.206(a), (c) (1997).

5. See *Cuba: A Guide for Canadian Business*, *supra* note 2.

6. 22 U.S.C.A. §§ 6001–6010 (West Supp. 1997).

pealed the CACR licensing scheme.<sup>7</sup> This repeal created an extra-territorial effect since American subsidiaries operating in foreign states were no longer permitted to export goods to Cuba, regardless of whether the goods contained components that originated in the United States.<sup>8</sup> Naturally, this action had an economic impact on the foreign countries in which the subsidiaries were located.

The Canadian government responded quickly to protect Canadian companies from the effects of the United States' CDA. The Canadian government created the "1992 Blocking Order,"<sup>9</sup> under the authority of the Foreign Extraterritorial Measures Act (FEMA),<sup>10</sup> prohibiting Canadian companies from complying with the CDA requirements. The 1992 Blocking Order required Canadian companies to ignore the CDA restrictions, such as the revocation of the licensing scheme, and to simply continue trading with Cuba as if nothing had changed.<sup>11</sup> The 1992 Blocking Order also required Canadian companies to report any communications, relating to the CDA, to the Canadian Attorney General, particularly if the communications had an effect on altering trade between Canadian businesses and Cuba.<sup>12</sup> To ensure compliance with the 1992 Blocking Order, monetary penalties were imposed for noncompliance.<sup>13</sup>

While the 1992 Blocking Order created conflict between United States and Canadian laws, U.S. subsidiaries and companies engaging in shipping activities were the primary groups affected.<sup>14</sup> Unless a completely Canadian-owned company was exporting products with U.S.-origin components, the United States could not apply the CDA to Canadian companies investing in Cuba. As a result, the Canada-Cuba economic relationship continued to develop.<sup>15</sup> Canadian investors took advantage of the opportunities created by Castro's gradual denationalization of Cuban industry and commerce.<sup>16</sup> Other countries were also attracted to the Cuban market by the cost-efficiency

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7. *See Cuba: A Guide for Canadian Business*, *supra* note 2.

8. 22 U.S.C.A. § 6005(a)(1) (West Supp. 1997).

9. Foreign Extraterritorial Measures (United States) Order, SOR/92-584, § 5 (1992) (Can).

10. R.S.C., ch. F-29 (1985) (Can).

11. *See id.*

12. *See id.* § 3(1).

13. *See infra* text accompanying note 62.

14. *See Cuba: A Guide for Canadian Business*, *supra* note 2.

15. *See id.*

16. *See id.*

and resource development potential of Cuban operations, as well as the complete lack of competition from the world's largest foreign investor, the United States.

#### B. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act

It is difficult for the community of nations to understand the American motivation behind enacting the Cuban Liberty And Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act).<sup>17</sup> Canada was one of the first countries to condemn the unwarranted Cuban aggression exhibited when Cuba downed two U.S. civilian aircraft. Even in view of the historically strained relations between the United States and Cuba, the enactment of the Helms-Burton Act, an attempt to force other countries to participate in the retaliatory action, could not have been anticipated.

Probably the most controversial provision of the Helms-Burton Act is Title III, which states:

Except as otherwise provided in this section, any person that, after the end of the 3-month period beginning on the effective date of this title, traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages . . . .<sup>18</sup>

This section allows U.S. nationals to take action against a foreign entity when the foreign entity is benefitting from United States property expropriated by the Cuban government. One of the primary problems with this provision is that the offense of "trafficking" is defined broadly and potentially includes any dealings with Cuban property.<sup>19</sup> Thus, the scope of this section has virtually unlimited application to foreign business operations. For example, the transportation system in Cuba is potentially founded on or crosses expro-

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17. 22 U.S.C.A. §§ 6021–6091 (West Supp. 1997).

18. *Id.* § 6082(a)(1)(A).

19. "Traffics" is defined in Title III of the Helms-Burton legislation and includes selling, transferring, distributing, dispensing, brokering, managing or otherwise disposing of confiscated property, as well as purchasing, leasing, receiving, possessing, obtaining control of, using or otherwise acquiring confiscated property. *See* 22 U.S.C.A. § 6023(13)(A). Engaging in commercial activities or benefitting from any of the above activities are also covered by the definition. *See id.*

priated property.<sup>20</sup> Would this create liability for a company obtaining a benefit by using the Cuban transportation system? Similarly, it is difficult to determine the scope of “property” as used in the Helms-Burton Act, because “property” includes all forms of intellectual property, future rights, securities and other interests.<sup>21</sup>

Foreign countries are also concerned that the claims of U.S. nationals are not limited to the value of the expropriated property, thus leaving foreign entities exposed to potential judgments up to three times the value of the property,<sup>22</sup> plus full indemnification for legal costs incurred by the U.S. national. Finally, the Helms-Burton Act creates an aura of confusion regarding its intended beneficiary because the claimant is not required to be an American national at the time of expropriation.<sup>23</sup> Even though President Clinton has presently suspended the right to sue under Title III,<sup>24</sup> the Helms-Burton Act remains a significant deterrent to other countries because of its threat of potential claims by American nationals against their citizens.

Title IV of the Helms-Burton Act denies certain individuals permission to enter the United States due to their affiliation with a property subject to claims by United States nationals. Title IV of the Helms-Burton Act states:

The Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States, any alien who the Secretary of State determines is a person who, after March 12, 1996:

- (1) has confiscated, or has directed or overseen the confiscation of, property, a claim to which is owned by a United States national, or converts or has converted for personal gain confiscated property, a claim to which is owned by a United States national;

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20. See Simon V. Potter, *Helms-Burton and Its Progeny: The March of Folly Continues*, Address at the American Conference Institute in Washington, D.C. (June 24, 1996) (copy of transcript on file with the *Stetson Law Review*).

21. See 22 U.S.C.A. § 6023(12)(A).

22. See *id.* § 6082(a)(3)(C)(ii).

23. See *id.* § 6082.

24. See *Globe and Mail*, July 16, 1997, at B1; see also *U.S. State Department* (visited May 27, 1998) <<http://www.state.gov/index.html>>. At the time of writing, Title III rights to file suit were suspended by President Clinton. The suspension from July 16, 1997 (to which the above notes refer) was renewed effective February 1, 1998 by President Clinton on January 16, 1996. See 16-01-98 Test: Clinton on Suspension of Helms-Burton Provision <<http://www.usembassy.org.uk/cuba31.html>> (visited June 13, 1998).

- (2) traffics in confiscated property, a claim to which is owned by a United States national;
- (3) is a corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a United States national; or
- (4) is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3).<sup>25</sup>

This provision was applied in Canada against Sherritt International, whose executives and their families were denied entry into the United States after the company refused to withdraw from its Cuban nickel mining operations.<sup>26</sup>

In addition to the civil rights of action and the possible denial of entry into the United States, the Helms-Burton Act has several other oppressive aspects. The first is its prohibition against importing goods into the United States that are "derived in whole or in part of any article which is the growth, produce or manufacture of Cuba."<sup>27</sup> An obvious example is sugar. Cuba is a primary world sugar producer. The United States has indicated that it will not allocate the import sugar quota to any country that cannot prove it is not importing Cuban raw sugar for re-export to the United States.<sup>28</sup> This prohibition creates a secondary boycott by forcing other countries to alter their supply of raw materials. This prohibition is particularly significant in Canada, because many imports from Cuba are raw materials and some Canadian exports are "value-added" since Cuba imports finished products from Canadian companies.<sup>29</sup>

### C. Canadian Responses to the Helms-Burton Legislation

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25. 22 U.S.C.A. § 6091(a) (West Supp. 1997).

26. See Anthony M. Solis, Comment, *The Long Arm of the U.S. Law: The Helms-Burton Act*, 19 LOY. L.A. INT'L & COMP. L.J. 709, 730-31 (1997).

27. 22 U.S.C.A. § 6040(a)(3).

28. See George Gedda, *U.S. Objects to Key Aspects of Anti-Castro Proposal*, ASSOC. PRESS, May 5, 1995, available in 1995 WL 437098.

29. For examples, see *Cuba: A Guide for Canadian Business*, supra note 2.

Due to its economic and political involvement with Cuba and the United States, Canada is extremely vulnerable to the long arm of the Helms-Burton Act. In principle, Canada does not agree with the American measures. Because its relationship with Cuba is so significant, Canada cannot afford to adhere to the Helms-Burton regime. Thus, Canada has been forced to counteract the "effects" of the Helms-Burton Act.<sup>30</sup> To fully understand the rationale behind the Canadian response, it is necessary to briefly examine the relationship between Canada and Cuba.

## II. CANADA'S RELATIONSHIP WITH CUBA

Over the years, Cuba and Canada have forged a strong economic relationship. As one of its largest investors, Canada's economic relationship with Cuba is strong, with approximately \$575 million (Cdn) of total trade in 1995.<sup>31</sup> Other major investors include Spain and Mexico, as well as approximately forty to fifty other countries.<sup>32</sup> Canada imports large quantities of raw metals, sugar, seafood, and precious stones. Canadian goods exported to Cuba primarily include foodstuffs (such as vegetables and cereal) and finished products such as machinery, iron, and steel products.<sup>33</sup> Additionally, an urgent need exists for specific goods and services not currently available in Cuba. Technology transfer is one of the biggest opportunities for Canadian companies because Cuba's relationship with the former Soviet Union has resulted in outdated infrastructural establishments.<sup>34</sup>

Investment opportunities in Cuba are further facilitated by new laws that encourage and assist foreign investment.<sup>35</sup> Other reforms include the formal recognition of hard currency, which has virtually eliminated the Cuban black market, and the opening of previously

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30. See *infra* Part III, at p. 1392.

31. See Beinvenido Garcia Negrin, *The Helms-Burton Law: The Latest Aggression*, Address at the Canadian Institute presented in Toronto, Canada (June 26, 1996) (copy of transcript on file with the *Stetson Law Review*).

32. See *Foreign Investment and Cuba*, *supra* note 1.

33. See *Cuba Fact Sheet* (visited Jan. 9, 1998) <<http://www.dfait-maeci.gc.ca/english/geo/lac/82015-e.htm>> [hereinafter *Cuba Fact Sheet*].

34. See *Cuba: A Guide for Canadian Business*, *supra* note 2.

35. See Ron First, *Cuba's Changing Foreign Investment Climate: Castro's Attempt to Lure Foreign Investors*, 9 *TRANSNAT'L LAW.* 295, 296-97 (1996).

nationalized industries to private investment.<sup>36</sup> Exceptions to these reforms are health, education, and defense applications.<sup>37</sup> In spite of these reforms, the Cuban government still retains significant control over all foreign investment.

Another significant bond between Canada and Cuba is tourism. According to the Canadian Department of Foreign Affairs and International Trade, almost 200,000 Canadians visited Cuba during 1996,<sup>38</sup> representing almost one-fifth of the total number of tourists traveling to Cuba.<sup>39</sup>

In the spirit of continuing economic relations, Canada is negotiating a bilateral Foreign Investment Protection and Promotion Agreement with the Cuban government to protect Canadian interests from unreasonable expropriation.<sup>40</sup> The general climate in Cuba is extremely positive for foreign investment. Cuba has resources in every business sector, and is located next to many convenient shipping routes, including the Panama Canal. For example, in 1996, foreign investors were diversified among thirty-four different Cuban business sectors, including agriculture, mining, petroleum, construction, and manufacturing.<sup>41</sup> One of the most significant Cuban dilemmas is that its resources were not developed in a balanced, modernized manner. Thus, Cuba needs the technology and expertise that foreign investors can provide. While labor in Cuba is relatively inexpensive, the Cuban government regulates the employment of Cuban citizens. Under certain circumstances, the Cuban government may require a foreign investor to form a joint venture with a Cuban employment firm.<sup>42</sup> It is difficult to estimate the exact effect of the United States' anti-Cuba legislation on the Canadian economic relationship with Cuba since it is impossible to know how many companies would have invested in Cuba if the embargo were not in place. However, it can be safely said that the Helms-Burton Act has almost certainly reduced the trade growth between Canada and Cuba.

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36. *See Cuba: A Guide for Canadian Business*, *supra* note 2.

37. *See id.*

38. *See Cuba Fact Sheet*, *supra* note 33.

39. *See Cuba: A Guide for Canadian Business*, *supra* note 2.

40. *See Douglas Farah, Cuba Signs Broad Pact with Canada*, WASH. POST, Jan. 23, 1997, at A1.

41. *See Cuba: A Guide for Canadian Business*, *supra* note 2.

42. *See First*, *supra* note 35, at 307.



### III. CANADIAN RESPONSE TO THE HELMS-BURTON LEGISLATION

Canada amended FEMA to increase the limits of the enforcement and penalty provisions of the 1992 Blocking Order.<sup>43</sup> Canada has also led challenges to the Helms-Burton Act under NAFTA and the Organization of American States (OAS).<sup>44</sup> Additionally, Canada joined the World Trade Organization's (WTO) Helms-Burton Act challenge, which was led by the European Union.<sup>45</sup>

#### A. Amendments to Domestic Legislation

##### 1. *Foreign Extraterritorial Measures Act*

FEMA was enacted in 1985 to defend Canadian interests from foreign governments that attempt to apply unreasonable extraterritorial laws or court rulings to Canadian citizens or entities.<sup>46</sup> FEMA authorizes the Canadian Attorney General to forbid compliance with extraterritorial measures imposed by any foreign government that infringe on Canadian sovereignty.<sup>47</sup> FEMA provides protection against disclosure of documentation or evidence from foreign decisionmaking bodies if such disclosure infringes upon the sovereignty of Canada.<sup>48</sup> The 1992 Blocking Order was enacted under the aus-

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43. See R.S.C. 1996 ch. 28, § 7(1) (1996) (Can.).

44. The OAS passed a resolution on June 4, 1996 calling on the Inter-American Juridical Committee to examine the Helms-Burton Act and report on its validity under international law. See Larry Rohter, *OAS Slams U.S. Action on Cuba*, NEWS & OBSERVER, June 6, 1996, at A14.

45. See Jose De Cordoba et al., *Clinton to Threaten to Deny U.S. Entry to Foreign Executives Active in Cuba*, WALL ST. J., May 24, 1996, at A8.

46. See R.S.C., ch. F-29 (1985) (Can.).

47. See *id.* § 3(1).

48. FEMA provides:

Where, in the opinion of the Attorney General of Canada, a foreign tribunal has exercised, is exercising or is proposing or likely to exercise jurisdiction or powers of a kind or in a manner that has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada or that otherwise has infringed or is likely to infringe Canadian sovereignty, or jurisdiction or powers that is or are related to the enforcement of a foreign trade law or a provision of a foreign trade law set out in the schedule, the Attorney General of Canada may, by order, prohibit or restrict the [production of records or giving of evidence].

*Id.*

pices of FEMA to prevent the application of the Cuban Democracy Act (CDA) in Canada.<sup>49</sup> FEMA has now broadened the scope of the 1992 Blocking Order to prohibit application of the Helms-Burton Act in Canada.<sup>50</sup>

On January 1, 1997, the Act to Amend the Foreign Extraterritorial Measures Act (Amending Act)<sup>51</sup> came into force, which specifically places the Helms-Burton Act on the "Foreign Objectionable Laws" list.<sup>52</sup> Section 7 of the Amending Act also provides for the addition of section 7.1 to FEMA, which states that: "Any judgment given under the law of the United States entitled Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 shall not be recognized or enforceable in any manner in Canada."<sup>53</sup>

The Canadian Attorney General has offered protection to Canadian businesses and individuals affected by the legislation. The clawback provision permits Canadian entities against whom judgments are made in American courts to sue the claimant in Canadian courts for damages in the amount of the judgment. This right is codified in section 9 of FEMA:

Where a judgment in respect of which an order has been made under section 8 has been given against a party who is a Canadian citizen, a resident of Canada, a corporation incorporated by or under a law of Canada or a province or a person carrying on business in Canada, or an order has been made under section 8.1 in favour of such a party in respect of a judgment, that party may, in Canada, sue for and recover from a person in whose favour the judgment is given

- (a) in the case of an order made under paragraph 8(1)(a) or (1.1)(a)
  - (i) any amount obtained from that party by that person under the judgment.<sup>54</sup>

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49. *See infra* text accompanying note 54.

50. *See infra* text accompanying note 57.

51. R.S.C. 1996, ch. 28 (1996) (Can.).

52. *See id.* § 8(1.1).

53. *Id.* § 7.1.

54. *Id.* § 9(1). Section 9 further provides that the party suing in a Canadian court can also recover all expenses it incurred defending the proceedings in the United States and any loss or damage suffered by the party by reason of enforcement of the judgment. *See id.* § 9(1)(a)(ii)–(iii).

Any judgment received could then be exercised against any assets held in Canada by the American claimant. Canadian companies sued in the United States for matters relating to the Helms-Burton Act are also permitted to seek recourse in Canadian courts against the United States claimant for the costs of litigation prior to the completion of proceedings in the United States.<sup>55</sup>

If the Canadian companies have no assets in the United States, American authorities are required to ask the Canadian Attorney General to enforce the judgment against the companies' Canadian assets.<sup>56</sup> The amendments to FEMA authorize the Canadian Attorney General to refuse any such request by the United States.<sup>57</sup> Alternatively, the Attorney General may issue an order for enforcement of a judgment in a specific amount for the purposes of recognition and enforcement in Canada. However, such an order may reduce the judgment to any amount deemed appropriate by the Attorney General.<sup>58</sup> Essentially, the effect of this provision is to allow the application of the Helms-Burton Act, but to defeat the Act's purpose.

## 2. Amended Blocking Order

The 1992 Blocking Order under FEMA served as a deterrent to Canadian companies from complying with objectionable American legislation. The Amended Blocking Order (ABO) was enacted in January 1996, as Canada felt that the 1992 Blocking Order was not strong enough to protect Canadian interests under the wider and more aggressively extraterritorial Helms-Burton Act.<sup>59</sup>

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55. *See id.* section 9(1.1), provides:

Where proceedings are instituted under an antitrust law, or a foreign trade law or a provision of a foreign trade law set out in the schedule, and no final judgment has been given under those proceedings against a party who is a Canadian citizen, a resident of Canada, a corporation incorporated by or under a law of Canada or a province or a person carrying on business in Canada, that party may, in Canada, with the consent of the Attorney General of Canada, at any time during the proceedings sue the person who instituted the action and recover from that person all expenses incurred by the party in defending those proceedings and in instituting proceedings under this Act, including all solicitor-client costs or judicial and extrajudicial costs.

*Id.*

56. *See id.* § 9(2).

57. *See* R.S.C. 1996, ch. 28, §§ 8(1)(a), 8(1.1)(a) (1996) (Can.).

58. *See id.* §§ 8(1)(b), 8(1.1)(b).

59. *See* Peter Lichenbaum & Selma Lussenberg, *International Legal Development in*

In the 1992 Blocking Order, the Canadian government was concerned that penalties under the Helms-Burton Act were significantly higher than those under the Canadian Order.<sup>60</sup> Canada was concerned that some companies might comply with the American legislation because it was the lesser of the two evils.<sup>61</sup> In an effort to reduce this likelihood, the penalty provisions of FEMA were significantly increased to allow Canadian courts to vary the amount of the penalty depending on the circumstances, up to a newly increased maximum of \$1.5 million (Cdn).<sup>62</sup> This is essentially in line with the maximum penalty under the Helms-Burton legislation of \$1 million (U.S.), and reduces any incentive of preference between penalties. The ABO also increased penalties through the imposition of personal liability to a maximum of \$150,000 (Cdn), or up to five years imprisonment for directors and officers of corporations found to be in breach of the ABO.<sup>63</sup>

The ABO imposes an affirmative obligation to report on Canadian corporations, as follows:

Every Canadian corporation and every director and officer of a Canadian corporation shall forthwith give notice to the Attorney General of Canada of any directive, instruction, intimation of policy or other communication relating to an extraterritorial measure of the United States in respect of any trade or commerce between Canada and Cuba that the Canadian corporation, director or officer has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.<sup>64</sup>

This notice is required to be written and to provide details of the communication, including names and the full text.<sup>65</sup> This provision raises significant issues regarding the definition of what constitutes

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*Review: 1996 Foreign Law*, 31 INT'L LAW. 477, 488 (1997); *see also* R.S.C. 1996, ch. 28 (1996) (Can.).

60. *See* R.S.C., ch. F-29 (1985) (Can.).

61. *See* Tim Kennish & Elizabeth Shriver, LIBERTAD and the Cuban Assets Control Regulations vs. The Canadian Foreign Extraterritorial Measures Act — Collision Course or Near Miss?, presented at the Canadian Institute in Toronto, Canada (June 26, 1996) (copy of transcript on file with the *Stetson Law Review*).

62. *See* R.S.C. 1996, ch. 28, § 7(1) (1996) (Can.).

63. *See id.*

64. Foreign Extraterritorial Measures (United States) Order, SOR/92-584, § 3(1) (1992) (Can.).

65. *See id.* § 4.

an ability to direct or influence the policies of a corporation, as well as the ambiguity associated with the phrase “intimation of policy.”<sup>66</sup>

The ABO also imposes an affirmative duty of non-compliance with the Helms-Burton legislation, in the following provision:

No Canadian corporation and no director, officer, manager or employee in a position of authority of a Canadian corporation shall, in respect of any trade or commerce between Canada and Cuba, comply with an extraterritorial measure of the United States or with any directive, instruction, intimation of policy or other communication relating to such a measure that the Canadian corporation or director, officer, manager or employee has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.<sup>67</sup>

More importantly, section 6 of the ABO states that:

Section 5 applies in respect of any act or omission constituting compliance, in respect of any trade or commerce between Canada and Cuba, with an extraterritorial measure of the United States or a communication referred to in that section, whether or not compliance with that measure or communication is the only purpose of that act or omission.<sup>68</sup>

Section 6 of the ABO is extremely important, because it broadens the application and enforceability of the ABO by almost creating a reverse onus provision. The Canadian company has to prove that any activity or omission was undertaken for purposes other than complying with the Helms-Burton Act.

Other significant features of the Canadian amendments to domestic legislation are the application of the ABO to services, instead of only goods as was the case in the 1992 Blocking Order.<sup>69</sup> The inclusion of services is defined to encompass technology, and requires U.S. subsidiaries operating in Canada to deal on a normal business basis with “specially designated nationals” (the term used in the Helms-Burton Act to prevent dealings between certain Canadian companies that deal with Cuba from conducting business with

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66. *Id.* § 3(1).

67. *Id.* § 5.

68. *Id.* § 6.

69. *See id.* § 2.

American subsidiaries).<sup>70</sup>

#### IV. PRACTICAL IMPLICATIONS FOR CANADIAN CORPORATIONS

##### A. Tremendous Uncertainty

The most significant problems faced by Canadian companies due to the Helms-Burton legislation and the Canadian response legislation arise from the confusion regarding which law to comply with, which policies to avoid (or implement), and which activities are, and are not, permitted.

The first cause of this uncertainty is that both sets of laws are deliberately drafted broadly with the intention of deterrence. As a result, it is difficult to know exactly what is included in the provisions. For example, the communication provision of the ABO provides for the written notice to the Canadian Attorney General of any "directive, instruction, intimation of policy or other communication" received from someone in a position to influence the policies of the company.<sup>71</sup> "Someone in a position to influence" is interpreted as not being limited to parent-subsidiary relationships, and thus could be triggered by a company deciding not to pursue a Cuban investment for fear of future backlash from a potential investor in the United States.<sup>72</sup> With respect to communication, it is difficult to know at what point a communication becomes "reportable," and the statement "intimation of policy" is ambiguous. The ABO does not define "intimation," and it is difficult to know who is to make the determination. As a result, Canadian companies are running a gauntlet between reporting too much and too little.

The ABO also provides that inaction can be equated to actions when the behavior of the Canadian business constitutes compliance with an extraterritorial measure of the United States.<sup>73</sup> This concept creates an inference that any activity that has the effect of altering a Canadian company's trade with Cuba will trigger the ABO. The same uncertainty arises from the Helms-Burton legislation, which

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70. Foreign Extraterritorial Measures (United States) Order, SOR/92-584 § 2 (1992) (Can.).

71. *Id.* § 3(1).

72. *See id.*

73. *See id.*

does not offer clear definitions of the extent of the offense of “trafficking,”<sup>74</sup> or what type of “property interest” is required to trigger the application of the legislation.<sup>75</sup> Both pieces of legislation are sufficiently vague to create significant problems for companies which are caught in the middle, not knowing either what laws to obey, or what the laws mean and how to avoid non-compliance.

The issue of definitional uncertainty extends to the definition of “U.S.-origin goods,”<sup>76</sup> in that the Canadian Export Control List considers goods to be of U.S. origin if they originate in the U.S. and have not been “further processed or manufactured outside the United States so as to result in a substantial change in value” — a narrower definition than that of the United States.<sup>77</sup> The consequence is that a product may be treated as being a U.S.-origin product by the American authorities, and thereby fall subject to the Helms-Burton legislation, but be completely legal for export to Cuba under Canadian laws.

Another uncertainty is at what point a company's action becomes compliance with the laws of another country. For example, if a company in Canada decides to sell its interests in Cuba due to pending notification of an entry ban against their officers, it is possible that they would be in compliance with an extraterritorial measure of the United States for the purposes of the ABO.

### B. Interlocking Directorships

One situation that may trigger the application of the Helms-Burton Act or the ABO and should be avoided by companies is that of interlocking directorships. Under Canadian legislation, directors can be found personally liable for contravention of the ABO.<sup>78</sup> Personal liability was added to the ABO as an added deterrent for Canadian companies contemplating non-compliance with the 1992 Blocking Order. However, the Helms-Burton Act creates a private

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74. See 22 U.S.C.A. § 6091(b)(2) (West Supp. 1997).

75. See M. Jean Anderson, *The Cuban Liberty and Democratic Solidarity Act of 1996*, presented at the Canadian Institute in Toronto, Canada (June 26, 1996) (copy of transcript on file with the *Stetson Law Review*).

76. See Canadian Export Control List, SOR/89-202 (1996) (Can.).

77. Compare Canadian Export Control List, SOR/89-202 (1996) (Can.), with 15 C.F.R. § 760.1(d)(12) (1996) (U.S. provision).

78. See Foreign Extraterritorial Measures (United States) Order, SOR/92-584, § 3(1) (1992) (Can.).

civil right against companies found to be in non-compliance with U.S. foreign policy, as well as the potential for denial of entry to the United States for directors, officers, and senior management.<sup>79</sup>

Interlocking directorships create a double jeopardy situation whereby the director could be personally liable in both countries for separate offenses. The directors in the United States could also be liable for the actions of the Canadian subsidiary in selling goods or services to Cuba. At the same time, directors could be subject to prosecution in Canada for compliance with a "communication" affecting trade between Canada and Cuba. As a result, the safest alternative for directors is to avoid interlocking directorships that could expose them to liability under both sets of laws.

### C. Subsidiary Relationships

Subsidiary relationships between U.S. corporations and foreign subsidiaries are one of the specific targets of the Helms-Burton Act.<sup>80</sup> Aside from the communication and interlocking directorships issues already discussed, internal communication between related companies could be caught in the gap between the Canadian and American legislation. For example, a U.S. parent company may issue an internal memorandum informing its Canadian subsidiary of the U.S. export restrictions without any implication whatsoever that the Canadian subsidiary should be complying. Any response by the Canadian subsidiary seeking clarification or further information could be seen as compliance with extraterritorial measures or of communications relating to restrictions on trade between Canada and Cuba. As a result, sections 3 and 5 of the ABO would be violated.<sup>81</sup>

### D. Technology Transfer

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79. See 22 U.S.C.A. § 6091(a)(3).

80. The Helms-Burton Act was in part a response to chill foreign investment in Cuba, following Cuba's attempt to bolster its declining economy. See Solis, *supra* note 26, at 716.

81. See Foreign Extraterritorial Measures (United States) Order, SOR/92-584, §§ 3, 5 (1992) (Can.).



Canadian companies incur liability through technology transfer to Cuba, because some of the technology may have been developed in the United States, or be subject to U.S. intellectual property rights. These technology transfers would be contrary to the ban on U.S.-origin components exported to Cuba (despite the fact that the entire product was manufactured and originated in Canada or another foreign country). The Helms-Burton Act specifically includes intellectual property in the interests of "property" to be considered in its application.<sup>82</sup> However, it does not address the issue of whether U.S.-developed technology would fall into the definition of U.S.-origin components for the purposes of the CACR.<sup>83</sup> This might arise when a U.S. software package was included in a Canadian manufactured computer exported to the United States. It is possible that either the licensee exporting to Cuba, or the licensor who sold the software to the Canadian company, may face liability under the Helms-Burton Act and the ABO.

#### E. Denial of Entry

One of the most publicized applications of the Helms-Burton Act was the notice to executives of Sherritt International that their officers and directors (including their immediate families) would be denied entry to the United States unless the company withdrew from its Cuban nickel operations within forty-five days of the notice.<sup>84</sup> Sherritt International is one of the first Canadian companies to invest in Cuba and has played a large role in the development of the nickel industry, which has become one of Cuba's richest sources of income.<sup>85</sup>

Sherritt declined to withdraw from its operations, and the United States has issued entry bans on several more individuals from the company.<sup>86</sup> However, the continual growth in the Cuban economy seems to support the proposition that although the Helms-

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82. 22 U.S.C.A. § 6023 (West Supp. 1997).

83. *See id.* § 6023(12)(A).

84. *See* Peter Morton & Alan Toulon, *Latest U.S. Move Against Sherritt Called "All-time Low,"* FIN. POST, Mar. 15, 1997, at 9.

85. *See* Cuba: Joint Venture \$300,000,000 Investment Aimed at Completing Nickel Mine Construction Project, KWG Resources (Canada) & Commercial Caribbean Nickel SA, 6 BUSINESS OPPORTUNITIES IN LATIN AMERICA AND THE CARIBBEAN 8 (1997), available in 1997 WL 9762450.

86. *See* Morton, *supra* note 84, at 9.

Burton Act may operate to deter some companies from investing in Cuba, as long as the potential for profit exists, other companies will step up to take their place (although it is impossible to know how many Canadian companies would have invested but for the Helms-Burton Act).

Another widely publicized Helms-Burton Act application was that of Cuban pyjamas being sold at Canadian Wal-Mart stores.<sup>87</sup> The Canadian operations of Wal-Mart received a directive from the American corporation to pull the pyjamas off the shelves as the sale violated the Helms-Burton Act.<sup>88</sup> Canada pressured Wal-Mart Canada to return the cotton pyjamas to the stores, and investigated whether the action violated FEMA.<sup>89</sup> The issue was rendered moot when the Canadian Wal-Mart stores elected to sell the pyjamas despite the directive from their American parent. It is not known whether the threat of sanctions under FEMA was responsible or not.<sup>90</sup>

#### F. Determination of Compliance

Canadian companies seeking to sell goods and services or to invest in Cuba frequently inquire about the application of the Helms-Burton Act to a given transaction. One issue is whether the goods or services being sold would obtain the benefit of expropriated property and therefore become subject to the Helms-Burton Act.<sup>91</sup> This determination is complex given the means available to ensure that the property in question is not expropriated or subject to a claim by a U.S. national. The first mechanism for such a determination is to request information from the Cuban authorities through the land registry system. Unfortunately, this method is slow, and often may not be entirely accurate.<sup>92</sup> To ensure the correctness of the

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87. See *Pyjamas Put Retailer at Centre of Dispute*, WINDSOR STAR, Mar. 7, 1997, at A9.

88. See *id.*

89. See Bernard Simon, *Wal-Mart Ends Cuba Dilemma*, FIN. TIMES, Mar. 14, 1997, at 4, available in 1997 WL 3779894.

90. See *id.*

91. See 22 U.S.C.A. § 6091(b)(2) (West Supp. 1997); 31 C.F.R. § 515.206(a), (c) (1996).

92. Part of the reason for the inaccuracy is the lack of preservation of property records. See generally Kern Alexander & Jon Mills, *Resolving Property Claims in Post-Socialist Cuba*, 27 LAW & POL'Y INT'L BUS. 137, 186 (1995).

Cuban information, a cross-check against the United States Foreign Claims Settlement Commission should be made to determine whether any claims have been registered against the property. However, this type of search also has drawbacks for a Canadian company as the records are not computerized, and thus, the Canadian company is forced to hire an individual on site in the United States to physically search the records.<sup>93</sup> Such action in itself could attract liability under the Canadian ABO as being an action constituting compliance with the Helms-Burton Act.<sup>94</sup> Refraining from the sale to avoid liability under the American legislation could also contravene the ABO.<sup>95</sup>

#### V. CONCLUSION

The Helms-Burton Act and subsequent Canadian legislation present serious issues for Canadian companies seeking to do business with Cuba. In some ways, however, the United States has sweetened the pot by eliminating the largest competitor (themselves), thereby making investment in Cuba much more attractive to Canadian corporations.

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93. See Stephen H. Marcus, *The Helms-Burton Act: Navigating the U.S. Legal Environment*, presented at the Canadian Institute in Toronto, Canada (June 26, 1996) (copy of transcript on file with the *Stetson Law Review*).

94. Amended Blocking Order, R.S.C. 1996, ch. 28 § 1 (1996) (Can.).

95. See *id.*